Supreme Court, U.S.

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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term 1997

Robert L. Bigsby, *Petitioner*

v.

Marvin R. Runyon, Postmaster General;
United States Postal Service; and
National Rural Letter Carriers' Association,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 1998

69 pp

QUESTIONS PRESENTED

1. Do the waiver requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(1)(A-H), apply to Title VII cases?

2. Can compliance with a union negotiated grievance settlement, and the acceptance of contractual benefits, waive an employee's Title VII claims by "accord and satisfaction"?

3. Can a federal employee's union be sued under Title VII?

4. Once discrimination claims are brought to court, do plaintiffs have to further exhaust administrative remedies to have subsquent retaliation claims considered, against the same defendants?

5. Is a district court order "final" and therefore appealable, if the court issues a show cause order and allows motions and briefs that could affect the facts, case law and merits determination of a case dismissed on summary judgment?

6. Can a plaintiff be sanctioned for filing a frivolous lawsuit, when the case was filed in another Circuit; transferred to a Circuit where a separate, but related case had not yet been decided, at the time of filing; and the district judge left issues unresolved that had to be appealed to protect review rights?

PARTIES TO PROCEEDING

All parties to the proceedings in this Court are listed on the cover.

Evelyn Bigsby, the petioner's wife and co-plaintiff in the district court, is not a party to these proceedings, and was properly dismissed as a party by the 5th Circuit Court of Appeals.

While not a party. the Solicitor General of the United States is being served in accordance to Rule 29.4a.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ROBERT L. BIGSBY, Petitioner,

v.

MARVIN T. RUNYON, Postmaster General;
UNITED STATES POSTAL SERVICE; and
NATIONAL RURAL LETTER CARRIERS'
ASSOCIATION, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert L. Bigsby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals which appears at Appendix A (Pet. app 1a-2a infra.), is not reported. The 2 memorandum opinions of the district court which appears at Appendix C (Pet. app 4a-26a infra.) are reported at 950 F.Supp. 761.

JURISDICTION

The court of appeals entered its judgment on October 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Jurisdiction for the court of appeals to review the district court final decision, dated November 22, 1996 was invoked under 28 U.S.C. § 1291, by Notice of Appeal dated December 3, 1996.

Original jurisdiction in the district court of first instance, in the ED of Wisconsin was invoked under 28 U.S.C. §§ 1331, 1337, 1339, and 1343.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq., in pertinent part prohibits retaliation, requires exhaustion of administrative remedies, and requires aggrieved employees to mitigate damages.

Section 626(1)(f)(A-H) of the A.D.E.A. 29 U.S.C. § 621 et seq. "The Older Workers Benefit Protection Act" requires that waivers be knowing and willing, and specifies conditions that must be met to waive statutory rights.

39 U.S.C. § 1208(b) is analogous to 29 U.S.C. § (85(a) and governs suits against the postal service and labor organization representing postal workers for breach of contract, and breach of the duty of fair representation.

28 U.S.C. § 1291 provides that "final" orders of district courts are appealable, as a right.

STATEMENT

1. INTRODUCTION

The petitioner was a rural letter carrier in Ripley, MS who was promoted, then demoted from the electronic technician position at Tupelo, MS in 1988, in violation of the U.S.P.S. National Agreements, with unions representing postal employees. Following complaints of religious discrimination, (atheist) the U.S.P.S. suspended the petitioner 4 times and fired him twice. This resulted in the filing of case 3:92CV013-D-D in U.S.D.C. ND of Mississippi on January 29, 1992, against all of the respondents for discrimination and breach of contract. During the pendency of that case, the respondents settled some of the disciplinary grievances to the advantage of the petitioner. It was the settlement of the final removal, during arbitration, before the arbitrator could rule, that prompted this lawsuit.

Under the terms of the union negotiated settlement, received on October 19, 1993, the petitioner was reinstated with back pay, promoted to

a similar electronic technician position and transferred to Oshkosh, WI under threat of termination. The petitioner brought a second suit against the same respondents alleging that the forced transfer was in retaliation for the first suit and that it was intended to illegally compromise his ability to maintain suit in Mississippi.

The petitioner has lost his home, was separated from his family, suffered health problems and had his credit destroyed. It is the petitioner's position that unless this Court grants certiorari, similar actions will be taken against other federal employees, to silence their complaints of illegal discrimination and retaliation.

2. PROCEEDINGS BELOW

This case was filed on April 14, 1994 in the U.S.D.C. ED of Wisconsin as case number 94-C-407.

On September 13, 1994 The Wisconsin district court dismissed the Title VII claims because the postal service and EEOC were still investigating the latest charges, and had not yet issued the right to sue letters, at the time of suit. The remaining charges were transferred to Mississippi for possible consolidation with case number 3:92CV013-D-D, then pending before Judge Glen Davidson in Aberdeen, MS. (See Pet. app 28a-32a. infra.) Consolidation never took place, and the case was assigned to Judge Biggers in Oxford, MS on September 26, 1994. where it became case number 3:94CV278-B-D. Trial was set for June 5, 1995 before Judge Biggers.

Since consolidation never took place and the district court refused to consider the new retaliation and breach of contract claims, with the first case, issues in the second case were never properly before the first court. On December 5, 1994 the district court granted summary judgment on the merits, in the first case, in favor of the respondents, which the court of appeals affirmed on November 39, 1995. (Memorandum Opinion at Pet. app 33a-45a. infra.)

An appeal to the 7th. Circuit Court of

Appeals, concerning the transfer of the case to Mississippi, was dismmissed for lack of a final order, during the pendency of the second case in Oxford, MS.

On July 7, 1995 the case was again transferred for a third time. The case was transferred to Judge Davidson by Judge Biggers, and the case became 1:94CV278-D-D.

On May 9, 1996, Judge Davidson, the same judge who dismissed the first case, dismissed the second case on the defendant's motions for summary judgment, ruling inter alia that the case was barred by accord and satisfaction, *res judicata*, collateral estoppel, and law of the court doctrine. The plaintiff was ordered to show cause why he should not be sanctioned for filing a frivolous lawsuit. (See Pet. app 4a-19a. infra.)

The petitioner responded with motions to alter or amend judgment, a motion to reconsider and a motion to file brief on possible application of the Older Workers Benefit Protection Act to alleged Title VII waivers, as well as a detailed analysis of why the district court decision was in error.

The district court granted the petitioner's motion on possible application of the O.W.B.P.A. to the case at hand on June 14, 1996, (See Pet. app 27a. infra.) and ruled against the petitioner on the other motions on November 21, 1996. (See Pet. app 20a-26a. infra.)

An appeal to the 5th Circuit was filed on December 3, 1996. On April 10, 1997 the court of appeals granted, without explanation, a joint motion by the respondents, to dismiss 5 of the 6 appeal issues as untimely, and only allowed the petitioner to brief the court on the frivolous lawsuit issue. (See Pet. app 3a. infra.)

On October 21, 1997, in an unsigned, unreported decision, the court of appeals dismissed the petitioner's appeal and sanctioned him for filing a frivolous lawsuit. (See Pet. app 1a-2a. infra.)

REASONS FOR GRANTING THE PETITION

I WAIVERS

Given the analogous purpose and case law between Title VII and the ADEA, would a waiver of claims under Title VII have to comply with waiver requirements made under the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(1)(f)(A-H) of the ADEA, is an important question the Court should grant certiorari to decide. This Court is already considering whether a defective waiver made pursuant to the Older Workers Benefit protection Act, is binding upon an employee who accepts money and signs a waiver agreement. Oubre v. Entergy Operations, Inc. docket number 96-1291 October 1997 Term.

This case is distinguished from Oubre in that the petitioner was not a signatory of the union negotiated grievance settlement; the agreement did not contemplate a waiver of Title VII claims; and all benefits accepted by the petitioner were contractual entitlement, not extra consideration for settlement of discrimination claims. Under the O.W.B.P.A., waivers cannot be unintentional, and must be made knowingly and willingly. This Court in Lorillard v. Pons, 434 U.S. 575, 584 (1978) and Oscar Mayer & Co. V. Evans, 441 U.S. 750, 751 (1979) recognized the important similarities between the ADEA and Title VII as to their aims and substantive prohibitions. The decision of the lower courts is erroneous and the Court should grant certiorari to correct the error and establish guidelines to eliminate implied waivers, that are inconsistent with the statutory purposes of Title VII.

II MITIGATION OF DAMAGES

This Court's ruling in Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) requires Title VII complainants to mitigate damages. In Garcia v. John C. Lawn; DEA, 805 F.2d 1400 (9th Cir. 1986) and Smith v. Texas Dept. of Water Resources, 818 F.2d 263 (5th Cir. 1987); cert. denied 108 S Ct 1012 (1988) the lower courts indicated that refusal to accept a transfer and new job assignments may not be "protected" activity and could render a case moot if the employee was terminated. In Robinson v. USPS

& NRLCA, No. 89-7782 (11th Cir. 1990) the court affirmed the right of an employer to fire an employee who would not transfer to Texas from Alabama, in a union negotiated settlement. Until Robinson v. Shell Oil Co. Docket Number 95-1376 (1997) was decided, it was not even clear if a terminated employee could file suit for post-employment retaliation.

Therefore to preserve an employee's right to sue for pre-termination and post-termination retaliation. the employee has no choice but to accept an offer of a job he is qualified for, and protest the action in civil proceedings. Under the ruling in Bigsby v. Runyon, 950 F.Supp 761 (5th Cir. 1996), the "acceptance" of a job waives the employee's statutory right to sue, by "accord and satisfaction." This finding is inconsistent with the congressional intent of Title VII, because it would permit employers to impose retaliatory transfers and job reassignments, on employees who have filed discrimination complaints.

This Court should grant certiorari and exercise its supervisory powers to resolve this important issue, since the ruling in Bigsby departs significantly from established cases.

III TITLE VII AND FEDERAL UNIONS

EEOC offices across the country refuse to accept discrimination complaints against federal employee unions, for lack of jurisdiction, based upon two 5th Circuit cases: Renfro v. OPETU, 545 F.2d 509 (5th Cir. 1977) and Newbold v. USPS, 614 F.2d 46 (5th. 1980); cert denied 449 U.S. 878. The 8th Circuit found jurisdiction in Jennings v. APWU, 672 F.2d 712, (8th Cir. 1982). This issue was raised by the petitioner, but never addressed by the lower courts. Because there is a conflict between the Circuits, certiorari should be granted to put this matter to rest. The chances for the Court to rule on this issue are few and the Court should avail itself with the opportunity presented here.

IV APPEALABILITY OF ORDER

On the joint motion of the respondents, the court of appeals dismissed 5 issues on appeal for

untimeliness. (Pet. app 3a, infra.) A district court order is final and therefore appealable when it terminates the litigation on the merits leaving nothing to be done except for enforcement of the judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) and Catlin v. United States, 324 U.S.229 (1945). In the case at hand, the district court's first order did not address most of the issues raised by the petitioner. The May 9th order cited erroneous facts, that were disputed by the evidence and the court's own findings. The order also suffered from case law that was inapposite to support the factual findings.

The court also issued a show cause order as to why the petitioner should not be sanctioned, which left open the possibility that it might reconsider its merits determination. Since the district court order did not dispose of all of the issues, and continued the litigation, the petitioner contends that the May 9th order was not final or appealable under 28 U.S.C. § 1291. In addition, the petitioner could not determine whether an appeal would be frivolous at this point, without a further ruling from the district court, clarifying its position.

The petitioner pointed the court to the shifting burden of proof articulated in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Once a prima facie case of retaliation had been made, the burden shifted to the defendant to put forth a legitimate, non-discriminatory explanation for its actions. Since the respondents could not cite any statutory, contractual or moral authority which would allow them to transfer a postal employee hundreds of miles and into another craft controlled by another union, the petitioner argued that he should have been granted summary judgment against the respondents.

The district court instead took the position rejected in USPS Board of Governors v. Aikens, 460 U.S. 711 (1983), that the petitioner had to offer direct evidence of discrimination. The district court refused to consider the obvious conflict of interest NRLCA general counsel William B. Peer had in representing the petitioner in a grievance-

arbitration hearing, that was abruptly halted before a decision could be rendered, while at the same time, representing the union in a lawsuit involving previous discrimination and breach of contract claims.

The district court also refused to consider in its memorandum opinions, the decisions in Alexander v. Gardner-Denver Co., 415 US 36 (1974) and Barrentine v. Arkansas-Best Freight System, Inc., 450 US 728 (1981), that submission of discrimination complaints to the grievance-arbitration procedures did not waive an employee's statutory rights and that a union could not waive an employee's statutory rights. (See Pet. app 4a-19a. infra.)

The court was considering motions that could have affected the merits of the case, such as the possible application of the O.W.B.P.A. to waivers of statutory rights. (See Pet. app 271. infra.), and motions to alter or amend and for reconsideration. The November 22 order (Pet. app 20a-26a. infra.) left no doubt that the district court would do no more and that the case was appealable at this point. A timely notice of appeal was filed December 3, 1996.

The appeal court erred in dismissing the petitioner's claims on the basis of untimeliness, since so many issues had been left unresolved. This Court should grant certiorari, clarify the rules governing appeals, and remand this case to the lower courts, with instructions, for a more complete ruling on the merits.

V EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Courts have ancillary jurisdiction.

The Circuits and district courts are somewhat divided on whether an employee must further exhaust administrative remedies before urging a complaint of retaliation, once jurisdiction is established on related claims. In Grimes v. Louisville & Nashville R.R. Co., 583 F.Supp 542 (SD IN 1984); affd. without published opinion 767 F.2d 925 (7th Cir. 1985); cert. denied 476 U.S. 1160 (1986). The court stated:

"It is the nature of retaliation claims that they arise only after the filing of an EEOC charge. To require a Plaintiff to resort to the EEOC process before bringing such a charge would mean that in every case where retaliation is an issue, the Plaintiff would have to file a second EEOC charge. The court is of the opinion that such a requirement would have the effect of erecting an unnecessary procedural barrier to the maintenance of a Title VII suit, which could discourage employees from exercising their rights under the Civil Rights Act."

The 5th, Circuit came to a similar result in Gupta v. E. TX State Univ., 654 F.2d 411 (5th Cir. 1981) and Gottlieb v. Tulane Univ. of La., 809 F.2d 278, 284 (5th Cir.1987). A sampling of court decisions which restrict consideration by the court of claims not first filed with the appropriate administrative agency, or leave doubt whether those claims could be considered under ancillary jurisdiction are: Miller v. Aluminum Company of America, 679 F.Supp 495 (WD Pa 1988); affd. without op 856 F.2d 184 (3rd Cir. 1988); Vermett v. Hough, 627 F.Supp 587 (WD Mich 1986); Pritchett v. General Motors Corp., 627 F.Supp 587 (D Md 1986) and Graham v. Texasgulf, Inc., 662 F.Supp 1451 (D Conn 1987;) affd. without op 842 F.2d 1287 (2nd Cir. 1988)

Both district courts rejected the petitioner's Title VII claims for want of "right to sue" letters, although there was a related case already pending in the court at the time. The petitioner presented his claims to the proper administrative authorities, but had not received the right to sue letters prior to filing suit. Because of the 6 month statute of limitations on breach of contract/duty of fair representation claims stated in, DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) suit had to be filed to preserve those claims. In Trent v. Bolger, 837 F.2d 657 (4th Cir. 1988), the court ruled that parallel processing of related complaints in different forums do not toll the 6 month statute of limitations in breach of contract suits. It would have wasted the court's time to file related claims in a piecemeal manner.

B. Petitioner had exhausted administrative remedies.

The requested right to sue letters were docketed with the court in March of 1995, when they were made available to the petitioner, and the court exercising jurisdiction was determined. The right to sue the union letter is included in Appendix G (See Pet. app 46a-47a. infra.). The U.S.P.S. Final Agency Decision, is included at Appendix H (See Pet. app 48a-50a. infra.) The district court should have considered the Title VII claims, or allowed the petitioner to amend his complaint to include the right to sue authorizations. The court in Waiters v. Parsons, 729 F.2d 233 (3rd Cir [Pa] 1984) allowed plaintiff who had filed informal complaint alleging failure to promote and then a formal complaint alleging retaliation to pursue complaint of discharge, even though formal complaint was not adjudicated by the E.E.O.C. and no right to sue letter was issued.

Because of the inconsistent treatment by the lower courts, the petition for certiorari should be granted so that the Supreme Court can resolve this very important issue.

VI INAPPROPRIATE SANCTIONS

The lower courts sanctioned the petitioner for filing a frivolous lawsuit. In Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1976) this Court cautioned courts not to look backwards and decide that a case was meritless because the court ultimately ruled against the plaintiff. In the memorandum opinion dated May 9, 1996, the district court at footnote 2 (See Pet. app 6a infra.) determined that the petitioner was not trying to relitigate old claims that had been decided in a previous case. The court then went on to state that the new claims were barred by res judicata and collateral estoppel. (See Pet. app 9a. infra.) This case originated in Wisconsin where the petitioner resided and where some of the retaliatory acts occurred. Relevant records were transferred to Wisconsin, with the petitioner, giving the ED of Wisconsin, jurisdiction. Since the ND of Mississippi court refused to allow any new claims

after May 1993 and all of the new claims arose on or after October 18, 1993, the claims were not redundant or frivolous.

The Wisconsin court transferred this second case to Mississippi, in part to conserve judicial resources and for possible consolidation, which never took place, with the first case which was still pending at the time. There is nothing in the record to indicate that the second suit was vexatious, made in bad faith, or patently frivolous. This Supreme Court has not yet rendered a decision on whether the waiver provisions of the Older Workers Benefit Protection Act can be circumvented by a defective waiver that the parties relied upon. Appealing the case was the only way to preserve the issue pending a favorable decision from this court. The issue of waivers had divided the Circuits and its answer was not so clear as to be frivolous. McKnight v. General Motors, 511 U.S. 659 (1994). The Court should grant certiorari to provide guidance to lower courts before they impose inappropriate sanctions.

VII RESTORATION OF CONFIDENCE

Justice Douglas once characterized a case before this Court, the following way:

> This case is minuscule in relation to the staggering problems of the Nation. But when a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone, for these days the average man can say: "There but for the grace of God, go I." Richardson v. Perales 402 U.S. 389, 413 (1971.

That description could easily apply to this case, except that the possible ramifications are far more ominous for employees everywhere, than on the individual petitioner. Because of the public's trust, federal employees accept the fact that the courts will deal more harshly with them in criminal cases. What federal employees cannot understand is why the lower courts continue to circumvent congressional intent by protecting government agencies from the consequences of their illegal

acts, with rulings that are inconsistent with the statutory purposes of anti-discrimination laws.

It would be very difficult for a federal employee, who has gone to court, to convince others that they should spend the thousands of hours, and tens of thousand of dollars to take a chance on legitimate forums to redress their complaints. The odds of success are so astronomically stacked against employees, that federal employees no longer have confidence in the judicial system.

Perhaps the courts are protesting their over burdened dockets, the shortage of judges, or the inadequate funding. All legitimate concerns to be sure. Perhaps the courts disagree with congress on what the law should be, and are attempting to legislate from the bench. There is even speculation that they feel they are protecting the public treasury. The lower courts are intentionally discouraging employees from filing suit, with hyper-technicalities and novel rulings to dismiss legitimate discrimination claims.

They have been uncommonly successful in discouraging federal employees to the detriment of society. Instead of relying on the proper legal forums, some employees have opted for more violent and illegal means to vent their anger over their mistreatment. This has resulted in numerous murders in the work place, for which the postal service is the most notorious, spawning the phrase "going postal" to describe these violent, and senseless acts that result from frustration and hopelessness.

Even more insidious is the hidden effects court decisions are having on federal agencies. Employees who believe they will not be treated fairly in the courts, can instead hurt their agencies in many subtle ways, that impair the agency's functions, and drain the economy. It is imperative for the Nation that courts become part of the overall solution and not add to the problems.

It is clear that the district courts and the court of appeals were annoyed by the number of claims advanced by the petitioner. In East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975) the court

cautioned that a person cannot be penalized for resorting to legal procedures that Congress has established in order to right congressionally recognized wrongs. The court further observed that the number of employment discrimination complaints filed by an employee cannot reflect poorly on the substantiality of any particular filing or be used as evidence of an employee's disputatious character. It appears that the lower courts are doing precisely this, when they ignored most of the petitioner's claims and sanctioned the petitioner. Unfortunately this is not an isolated case.

The Supreme Court with it's ability to supervise the lower courts is in the best position to reform the system and re-establish employee confidence in the judaical system. Agency accountability will force managers to make necessary changes, which when implemented will drastically reduce employee claims in the courts.

CONCLUSION

It is very seldom that granting certiorari in a single case, would allow the Court to rule on as many issues, which directly affect millions of employees. This is an opportunity for the Court to conserve its resources and still provide guidance to the lower courts, the EEOC, and to restore the confidence of federal employees in non-violent forums to resolve their complaints. The petition for a writ of certiorari should be granted, for any or all of the reasons stated above, or for any other reason the Court deems appropriate.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60858
Conference Calandar

COURT OF APPEALS
FILED
OCT 22 1997
CHARLES R. FULBRIDGE III
CLERK

ROBERT L. BIGSBY,

Plaintiff-Appellant,

versus

MARVIN T. RUNYON, Postmaster General;
UNITED STATES POSTAL SERVICE;
NATIONAL RURAL LETTER CARRIER'S ASSOCIATION,

Defendants-Appelllees

- - - - - - - - - - -

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:94-CV-278-D-D

- - - - - - - - - - -

Before POLITZ, Chief Judge, and WIENER and DENNIS, Circuit Judges.

PER CURIAM:*

Robert Bigsby appeals the district court's imposition of sanctions. We have reviewed the record and briefs, and we conclude that the district court's decision to impose sanctions was not an abuse of discretion. See Krim v. BancTexas Group, Inc., 99 F.3d 775, 777 (5th Cir. 1996); Natural Gas Pipeline Co. of America v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993). Bigsby's appeal is without merit and therefore frivolous.

* Pursuant to 5th Cir. R. 47.5, the court has

determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); See 5th Cir. R. 42.2.

Bigsby's history of frivolous filings demonstrates that he is a vexatious and harassing litigant. Accordingly, Bigsby is BARRED from filing any pro se civil appeal in this court without the prior written approval of a judge of this court in active service. Further he is BARRED from filing any pro se intital civil pleading in any court which is subject to this court's jurisdiction, without the advance written permission of a judge of the forum court. The clerk of this court and the clerks of all federal district courts subject to the jurisdiction of this court are directed to return to Bigsby, unfiled, any attempted submision inconsistent with this bar.

APPEAL DISMISSED; SANCTIONS IMPOSED.

[No Signature]
ISSUED AS MANDATE DEC 15, 1997
Filed December 16, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60858

U.S. COURT OF APPEALS
FILED
APR 10 1997
CHARLES R, FULBRIDGE III

ROBERT L BIGSBY; EVELYN BIGSBY
Plaintiffs - Appellants

v.

MARVIN T RUNYON, Postmaster General;
UNITED STATES POSTAL SERVICE; and
NATIONAL RURAL LETTER CARRIERS' ASSOCIATION
Defendants - Appellees

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

Before SMITH, DUHE, and BARKSDALE, Circuit Judges.
BY THE COURT:

IT IS ORDERED that the joint motion of appellees for dismissal of five claims, filed by the appellant due to untimeliness is GRANTED. (hand-written)

IT IS FURTHER ORDERED that the appellees' alternative motion for leave to brief only the issue on sanctions is GRANTED (hand-written)

IT IS FURTHER ORDERED that the joint motion of appellees for an extension of 30 days from the Court's ruling, on the motion to dismiss within which to file their brief is GRANTED (hand-written)

(unreadable hand writing, possibly initials or signatures)

950 F.Supp. 761

Robert L. BIGSBY and Evelyn Bigsby,
Plaintiffs,
v.
Marvin T. RUNYON, Postmaster General;
United States Postal Service; and
National Rural Letter Carriers Association,
Defendants.

Civil Action No. 1:94CV278-D-D.

United States District Court
N.D. Mississippi, Eastern Division.

May 9, 1996 Opinion on Subsequent Motions
Nov. 21, 1996.

MEMORANDUM OPINION

DAVIDSON, District Judge.

Now before the court are various motions of the parties. The pro se plaintiffs in this case have moved the court for leave to file a motion for summary judgment out of time, for the entry of summary judgment on their behalf, for a hearing on the merits of their motion for summary judgment, and for the appointment of a special master to hear this cause. The defendant National Rural Letter Carriers Association ("NRLCA"), in turn, has moved the court to partially strike the plaintiffs' demand for a jury trial, and to dismiss, or in the alternative for summary judgment, on the plaintiffs' claims against them. The postal defendants, United States Postal Service ("USPS") and Marvin T. Runyon, have also filed a Motion to Dismiss, or in the Alternative for Summary Judgment.

I. THE PLAINTIFFS' CLAIMS

As with the undersigned's latest encounter with Robert Bigsby, [FN1] the factual background of this cause is too colossal to describe in any detail here. Any attempt to do so would unduly burden this court. When particular facts are necessary for the discussion of the plaintiffs' claims, the court will provide them.

> [FN1]. Bigsby v. Runyon, Civil Action No. 3:92cv13-D-D (N.D.Miss. Dec. 24, 1995) (Davidson, J.) (Memorandum Opinion and Order Granting Motions for Summary Judgment).

All of the plaintiffs' claims in this case arise out of a negotiated settlement agreement (hereinafter "settlement agreement") arguably reached between the plaintiff Robert Bigsby, the defendant USPS and the defendant NRLCA. The terms of the settlement were essentially straightforward. In exchange for Mr. Bigsby's withdrawal of certain grievances and requests for arbitration in connection with his impending termination of employment with the Postal Service, the USPS essentially agreed to: 1. not terminate Mr. Bigsby from his employment with the Postal Service; 2. transfer Mr. Bigsby from his rural letter carrier position in Mississippi to an "Electronics Technician" position in Oshkosh, Wisconsin; and 3. give Mr. Bigsby $16,718.31 as backpay. The parties are in dispute as to Mr. Bigsby's disposition with regard to this settlement agreement, and it is his position that this agreement was forced upon him by his NRLCA representative without his consent. In any event, it appears undisputed that he accepted the $16,718.31 and relocated to Oshkosh to accept the offered position, where he presumably is still employed with the Postal Service as an electronics technician.

The plaintiffs originally filed this particular action on April 14, 1994 in the

United States District Court for the Eastern District of Wisconsin. The Bigsbys charged in that complaint that the actions of the defendants surrounding this settlement constituted breach of contract, breach of the duty of fair representation and reprisal discrimination under Title VII of the Civil Rights Act. [FN2] United States District Judge Terrance T. Evans, Chief Judge for the Eastern District of Wisconsin, presided over the case. Upon consideration of the defendants' motion to dismiss or transfer, Chief Judge Evans dismissed all of the plaintiffs' Title VII claims for lack of jurisdiction by order dated September 13, 1994. Bigsby v. Runyon, Civil Action No. 94-C-407 (E.D.Wis. Sept. 14, 1994) (Evans, C.J.) (Order Dismissing Title VII claims and Transferring Cause to the Northern District of Mississippi). With those claims dismissed, Chief Judge Evans transferred, in that same order, the case and its remaining claims to this District for possible consolidation with Mr. Bigsby's then-pending action before this court. Consolidation never occurred, however, and Mr. Bigsby's other litigation before this court ended when the undersigned dismissed all of his claims in that case by order dated December 5, 1994. Mr. Bigsby appealed that decision to the Fifth Circuit, which affirmed this court's order on November 29, 1995.

> [FN2.] In their complaint, the plaintiffs also listed numerous Title VII claims of discrimination which were then currently pending before the undersigned in Bigsby v. Runyon, Civil Action No. 3:92cv13-D-D. It does not appear to the court that the complaint seeks to state these claims again in this action, but rather notes that the claims were in fact filed and are the asserted basis of reprisal discrimination by the defendants. In the interest of completeness, however, the court will address those claims as

if they have indeed been reasserted in this action.

The court finds that the motions of the defendants to dismiss or for summary judgment are well taken and shall be granted. The motions of the plaintiffs in this cause are not well taken and shall be denied. There are no genuine issues of material fact as to the case at bar, and the defendants are entitled to the entry of a judgment as a matter of law. Most of the plaintiffs' claims are properly dismissed for multiple reasons, as set out below.

II. PLAINTIFFS' TITLE VII CLAIMS

1. "LAW OF THE CASE" DOCTRINE

As already noted by the court, all of the plaintiffs' claims arising under Title VII were dismissed from this action while it was still pending in the Eastern District of Wisconsin. Chief Judge Evans' order was based upon a lack of jurisdiction because the plaintiffs had not obtained a "right to sue" letter from the EEOC. See Tolbert v. United States, 916 F.2d 245, 247 (5th Cir.1990) (stating failure to comply with exhaustion requirement in Title VII claims deprives court of subject matter jurisdiction). Indeed, the Chief Judge noted in his order that "Mr. Bigsby says that his Title VII claim is not ripe because he does not have a notice of right to sue.... On the basis of Mr. Bigsby's representation regarding his Title VII claim, that claim is dismissed."

Generally, "when a court decides upon a rule of law that decision should continue to govern the same issues in subsequent stages of the same case." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 814, 108 S.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988) . This is

known as the "law of the case" doctrine which was developed to "maintain consistency and avoid [needless] reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d ° 4478 at 788 (1981). This principle applies equally to the court's own decisions as well as the decisions of a coordinate court. Christianson, 486 U.S. at 814, 108 S.Ct. at 2176-77. However, "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although it 'should be loathe to do so in the absence of extraordinary circumstances....' " Id. (quoting Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983)). The Fifth Circuit has held that there are three extraordinary circumstances that allow this court to revisit an issue previously decided by a coordinate court. This court will not reexamine unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice." Royal Ins. Co. v. Quinn-L Capital Corp., 3 F.3d 877, 880 (5th Cir.1993) ; North Miss. Communications v. Jones, 951 F.2d 652, 656 (5th Cir.) , cert. denied, 506 U.S. 863, 113 S.Ct. 184, 121 L.Ed.2d 129 (1992) . None of the exceptions apply in this case, and the plaintiffs have offered no evidence that would even warrant the attention of this court to reconsider Chief Judge Evans' order of September 13, 1994.

2. THIS COURT'S JURISDICTION

Even if the undersigned were to reconsider the dismissal of the Title VII claims, the decision would remain unchanged.

To this date, the plaintiffs have failed to produce an appropriate "right to sue" letter issued by the EEOC on their reprisal claim. Mr. Bigsby contends that he is not required to obtain a "right to sue" letter for a claim of reprisal discrimination, and directs this court's attention to the decision of Gupta v. East Tex. State Univ., 654 F.2d 411 (5th Cir.1981) . Mr. Bigsby is indeed correct to the extent that, at least within the Fifth Circuit, a plaintiff who has Title VII discrimination claims properly pending before a district court need not obtain a "right to sue" letter to return to that court and charge retaliation for the filing of the original claims. Gottlieb v. Tulane Univ. of La., 809 F.2d 278, 284 (5th Cir.1987) ; Gupta, 654 F.2d at 414; Ryman v. Office & Professional Emp. Intern. Union, 628 F.Supp. 421, 429 (E.D.Tex.1985) . However, the undersigned notes that none of Mr. Bigsby's original EEOC complaints were properly before this court. All of his Title VII claims were dismissed by this court's order as not properly before the court, and all of them suffered from procedural infirmities in addition to lack of substantive merit. Because this court never possessed jurisdiction over Mr. Bigsby's original EEOC claims, it cannot use those claims to exercise ancillary jurisdiction over his current claim of retaliation as discussed in Gupta.

3. RES JUDICATA and COLLATERAL ESTOPPEL

To the extent that the Bigsbys seek to relitigate any of Mr. Bigsby's claims, Title VII or otherwise, asserted in his prior action before this court, those claims are properly dismissed from this action. This court's order of December 6, 1994, dismissed all of those claims, and the Fifth Circuit affirmed that order on November 29, 1995. Mr. Bigsby is precluded from relitigating any claims dismissed under that action by virtue of the

doctrine of res judicata, and Ms. Bigsby is likewise precluded by the doctrine of collateral estoppel. See Recoveredge v. Pentecost, 44 F.3d 1284, 1290 (5th Cir.1995) (discussing federal requirements for collateral estoppel); Travelers Ins. Co. v. St. Jude Hosp., 37 F.3d 193, 195 (5th Cir.1994) (discussing federal requirements for application of res judicata).

4. MERITS OF THE CLAIMS

As to all of the plaintiffs' Title VII claims which were addressed in this court's Opinion and Order of December 6, 1994, the undersigned again finds that they are without substantive merit. The plaintiff has offered no evidence to support those claims which are sufficient to survive a motion for summary judgment. Likewise, the court finds that his reprisal claim in this case is also without substantive merit. Other than the fact that Mr. Bigsby did in fact pursue Title VII claims against these defendants, and that this settlement agreement was reached with regard to other claims, the plaintiffs can produce no admissible evidence that would lead a reasonable juror to believe that Mr. Bigsby was discriminated against in violation of Title VII.

III. BREACH OF CONTRACT AND BREACH OF THE DUTY OF FAIR REPRESENTATION

1. ACCORD AND SATISFACTION

The most obvious reason that the Bigsbys cannot challenge the settlement agreement derives from a fundamental premise of contract law--the doctrine of accord and satisfaction. See generally, 1 Am.Jur.2d Accord and Satisfaction (1994); Alexander v. Tri-County Co-op, 609 So.2d 401, 404 (Miss.1992) (explaining elements of accord and satisfaction under Mississippi law). A party

such as Mr. Bigsby cannot accept the benefits of a settlement contract and then later challenge its validity. Mr. Bigsby states that relocation and acceptance of the ET-9 position in Oshkosh was the product of coercion by the defendants, because the Postal Service told him "Should Mr. Bigsby fail to report for duty by November 8, 1993, the Postal Service is relieved of all employment obligations to him." The plaintiffs take this as coercive, because "[i]n other words, if the Plaintiff did not take the position in Oshkosh, he would be terminated." Mr. Bigsby appears to forget that without the settlement agreement he seeks to challenge, he was already terminated from his employment with the Postal Service. Indeed, the reason the parties attended arbitration at the time was because of the "Notice of Removal" Mr. Bigsby had received on April 16, 1993. He found himself in no worse a scenario than before acceptance of the agreement's terms.

In any event, relocation and acceptance of the ET-9 position was not the only term of the agreement. Not only did Mr. Bigsby move to Oshkosh and continue his employment with the Postal Service as an Electronics Technician, he accepted payment of the $16,718.31 of backpay as contemplated in the settlement agreement. Had he wished to challenge the agreement as dispositive of his claims then pending in arbitration, he should have refused acceptance of the $16,718.31 and declined to move to Oshkosh and accept the ET-9 position. He would have then been free to pursue the available remedies to which he would have been entitled. Instead, he chose to accept the benefits of the settlement agreement after he knew of the terms to which he now objects. Mr. Bigsby has made his bed out of this settlement agreement, and now he must lay in it. The plaintiffs have offered no discernable evidence of "coercion" on the part of the defendants in this matter, for the "threat" of

termination from his employment with the Postal Service was no different from his impending termination before the settlement was reached.

2. MERITS OF THE CLAIMS

The plaintiffs agree that at least a tentative settlement agreement had been reached on October 13, 1993, but that: [e]verything abruptly changed on October 18, 1993 however, when the NRLCA allowed the USPS to change their previously agreed upon settlement from "The Postal Service agrees to ALLOW the Grievant (Plaintiff) to transfer ..." [to a job in Oshkosh,] to: "Should Mr. Bigsby fail to report for duty on November 8, 1993 the Postal Service is relieved of all employment obligations to him." As the Plaintiff's attorney explained it, after conversing with the Defendants attorneys, if the Plaintiff did not go to Oshkosh, he would be fired. This interpretation of the October 18th. letter was again confirmed by the union, who also indicated, that as of October 19, 1993, the Plaintiff was no longer in the rural craft, and they no longer had any obligation toward the Plaintiff.... This is when the breach of contract by the USPS actually started and when the NRLCA breached its duty of fair representation. At this point the Plaintiff however, had no reason to believe that he would be denied his maintenance craft seniority and proper pay step, or that the lawsuit would not be settled. Plaintiffs' Response and Opposition to Defendant USPS' Motion for Summary Judgment, pp. 4-5. The evidence, however, presents a different story. The terms of the written October 13 agreement do not, on their face, stray from the terms of the October 18 letter of which the plaintiffs complain: The Postal Service agrees to allow grievant to transfer to the position of an ET-9 Electronics Technician, located in Oshkosh, Wisconsin. The grievant will report

to this position by no later than November 8, 1993. The grievant will pay his own moving expenses. The seniority of the grievant in the maintenance craft will be in accordance with the provisions of Article 38--Section 3(E) of the Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO (1990-1994); specifically, "Employees who change from one craft to another on or after June 25, 1992, shall begin a new period of seniority for preferred assignment." The grievant must also meet the other requirements of the contract with the APWU. The grievant is not entitled to any special training for this position nor to any other special conditions of employment not called for by the collective bargaining agreement with the APWU. The Bigsbys concede that they had possession of this document at least as early as October 18, 1993. Mr. Bigsby knew, or should have known from the express terms contained in this memorialization of the settlement agreement, that he would lose his seniority within the Rural Carrier craft and therefore any commensurate benefits, such as a higher pay step, if he accepted the settlement offer.

In order to prevail on their claim that the NRLCA breached its duty of fair representation, the plaintiffs would have to prove that the NRLCA's conduct was "arbitrary, discriminatory, or in bad faith," and a mere showing of negligence does not state a claim in this regard. United Steelworkers of America v. Rawson, 495 U.S. 362, 372, 110 S.Ct. 1904, 1911, 109 L.Ed.2d 362 (1990) . In light of Mr. Bigsby's proclivity to file meritless claims with whomever will allow him, there is no evidence that the NRLCA has performed in anything but a reasonable manner in obtaining a settlement favorable to his interests in this matter.

The plaintiffs' breach of contract claim likewise fails, for it is dependent upon its

sister claim. Normally, it is the exclusive duty of the union to enforce an employee's rights under a collective bargaining agreement, and therefore an individual employee usually has no standing to enforce contractual rights arising under the collective bargaining agreement. McNair v. USPS, 768 F.2d 730, 735 (5th Cir.1985) ; Ross v. Runyon, 858 F.Supp. 630, 634 (S.D.Tex.1994) . Because this responsibility rests upon the shoulders of the union, demonstration of a breach of the duty of fair representation is a prerequisite for an individual plaintiff to maintain an action against an employer for such a breach. Thomas v. LTV Corp., 39 F.3d 611, 621 (5th Cir.1994) (referring to breach of duty of fair representation as "indispensable predicate" to maintenance of § 301 action against employer). In this case, the plaintiffs can prevail on neither. There is no evidence before this court that would lead a reasonable juror to return a verdict in the plaintiffs' favor on either of these claims. There is no genuine issue of material fact as to the plaintiffs' claims, and the defendants are entitled to the entry of a judgment as a matter of law.

IV. EVELYN BIGSBY AS A PROPER PARTY TO THIS ACTION

Evelyn Bigsby is named as a party to this suit, much to the confusion of the defendants. The plaintiffs have not alleged nor provided any sufficient basis of standing for Ms. Bigsby in this action. See, e.g., Souter v. International Union, 993 F.2d 595, 597 n. 1 (7th Cir.1993) (spouse had no standing to assert § 301 hybrid action claims); Crandall v. Prudential Ins. Co., 691 F.Supp. 814, 827 (D.N.J.1988) (spouse had no standing to assert Title VII claims). Ms. Bigsby and her claims are also properly dismissed from this action for that reason.

V. THE PLAINTIFFS' MOTIONS

The deadline for filing motions in this case expired on May 21, 1995. The plaintiffs did not file their instant motions until March 22, 1996, approximately nine (9) months late. They have offered no reasonable explanation for the delay, and the plaintiffs are not entitled to any additional consideration by virtue of their pro se status. Their tardiness alone justifies denial.

VI. POTENTIAL SANCTIONS AGAINST THE PLAINTIFFS

This court grows weary of expending judicial energy upon meritless and frivolous lawsuits. Mr. Bigsby has waged a crusade against the Postal Service for several years now, and as already noted, makes his second appearance in this district with his claims. The administrative structures of the Equal Employment Opportunity Commission and the National Labor Relations Board, however, have waded through a seemingly endless stream of filings by Mr. Bigsby. None of his administrative filings have obtained him official relief [FN3], all of his prior claims before this court were dismissed, and all of his claims are being dismissed for multiple reasons in this action today. This court finds that the claims asserted in this cause are frivolous, for the plaintiffs have failed to show that their claims have any basis in fact or law. Had the plaintiffs been required, as pro se prisoner litigants are, to undergo a Spears hearing to determine the merit of their claims prior to the issuance of process, this action would have been dismissed as frivolous long ago. See 28 U.S.C. º 636(b)(1)(B); Uniform Local Rule M-4.1(b); Spears v. McCotter, 766 F.2d 179, 182 (5th Cir.1985) . Regrettably, the defendants in this matter did not have the benefit of such a hearing, and as a consequence have undergone an additional two years of litigation.

FN3. Apparently, some of Mr. Bigsby's prior administrative claims other than those at issue today have been settled. Contrary to Mr. Bigsby's belief, the fact that some claims have been settled is no reflection upon the merit of those claims. A party may wish to settle claims against them for the pure sake of avoiding the expense and time of defending those claims.

Pro se litigants are not beyond the purview of the sanctions contained in Federal Rule of Civil Procedure 11 for the filing of meritless and frivolous claims. The Bigsbys are bound by the same obligations as attorneys to investigate their claims, both factually and legally, to determine their merit before filing. Such an obligation ensures that judicial resources are not wasted, and that defendants are not harassed by disgruntled parties with the rigors of unnecessary litigation. As well, this court always carries with it the inherent power to sanction misconduct by the parties appearing before it. Sanctions can be monetary, such as the payment of attorneys' fees for the opposing party, or they may be injunctive. In re Grant Anderson, 511 U.S. 364, 365, 114 S.Ct. 1606, 1607, 128 L.Ed.2d 332 (1994) ; Support Systems Int'l v. Mack, 45 F.3d 185, 186 (7th Cir.1995) ; Vinson v. Heckmann, 940 F.2d 114, 116 (5th Cir.1991) .This court, by order of United States District Judge Neal Biggers, Jr., has recently imposed such injunctive sanctions against a member of the Mississippi bar for his repeated filing of frivolous actions. Prewitt v. Alexander, Civil Action No. 4:94cv94-B-B (N.D.Miss. Feb. 27, 1996) (Biggers, J.) (Opinion and Order Granting Motion for Sanctions; precluding and restraining plaintiff from filing new actions in the Northern District of Mississippi without prior

court approval). Therefore, this court directs the plaintiffs to provide reasons to this court why they should not be sanctioned for the filing of this litigation against these defendants. The plaintiffs are forewarned that the lack of training in law is no excuse, for they shoulder the same responsibilities regardless of whether they have hired an attorney.

CONCLUSION

There are no genuine issues of material fact in the case at bar, and the defendants are entitled to the entry of a judgment as a matter of law on all of the plaintiffs' claims. While this court has offered discussion of several reasons for dismissal of the plaintiffs' claims, additional reasons which justify dismissal are left unmentioned. Other claims not discussed by the court in this opinion are also without merit and should properly be dismissed. As a result of all of these reasons for dismissal, this court finds the plaintiffs' claims in this cause patently frivolous, and is of the opinion that they were vexatiously brought by the plaintiffs in bad faith. This court's time and patience are finite, and numerous claims of merit await consideration in this district. The undersigned will not allow this court to become an instrument of harassment for pro se litigants to wield, at public expense, against whomever they feel deserves punishment by the filing of meritless claims.

A separate order in accordance with this opinion shall issue this day.

THIS 9th day of May 1996

s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROBERT L. BIGSBY
and EVELYN BIGSBY PLAINTIFFS

vs. Civil Action No. 1:94cv278-D-D

MARVIN T. RUNYON,
Postmaster General; UNITED
STATES POSTAL SERVICE; and
NATIONAL RURAL LETTER
CARRIERS ASSOCIATION DEFENDANTS

ORDER

Pursuant to a memorandum opinion issued this day, it is therefore ORDERED THAT:

1) the plaintiffs' Motion to File Oversized Motion for Summary Judgment Out of Time is hereby DENIED;

2) the plaintiffs' Motion for Summary Judgment is hereby DENIED;

3) the plaintiffs' Motion for the Appointment of a Special Master is hereby DENIED;

4) the plaintiffs' Motion for Hearing on Motion for Summary Judgment is hereby DENIED;

5) the defendant National Rural Letter Carriers Association's Motion to Dismiss, or in the alternative for Summary Judgment is hereby GRANTED;

6) the motion of the defendants Marvin T. Runyon and United States Postal Service to Dismiss, or in the Alternative, for Summary

Judgment is hereby GRANTED;

7) All of the plaintiffs' claims in this cause are hereby DISMISSED.

8) the defendant National Rural Letter Carriers Association's Motion to Strike Plaintiffs' Demand for Jury Trial is hereby DENIED AS MOOT.

9) the plaintiffs are hereby WARNED that the court is very seriously considering sanctions against them under Federal Rule of Civil Procedure 11 and the inherent power of the court for the filing of frivolous and vexatious claims against these defendants. Potential sanctions could be monetary, injunctive, or both. They are therefore, ORDERED TO SHOW CAUSE why they should not be so sanctioned and held accountable. The plaintiffs shall, within thirty(30) days of the date of this order, submit to this court their reasons. Within ten(10) days of their submission, the defendants may respond. The page limitations of Uniform Local Rule 8 shall apply to these submissions of the parties. The plaintiffs are also warned that any future frivolous or vexatious filings made by them will also be scrutinized by this court for the imposition of sanctions.

All memoranda, depositions, affidavits and other matters considered by the court in denying the defendant's motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this the 9th day of May, 1996.

s/ Glen H. Davidson
United States District Judge

MEMORANDUM OPINION ON MOTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

FILED
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NORMAN L GILLESPIE, CLERK

ROBERT L. BIGSBY
and EVELYN bIGSBY PLAINTIFFS

vs. Civil Action No.
1:94cv278-D-D

MARVIN T. RUNYON,
Postmaster General; UNITED
STATES POSTAL SERVICE; and
NATIONALRURAL LETTER CARRIERS ASSOCIATION
DEFENDANTS

MEMORANDUM OPINION

By memorandum opinion and order dated May 28, 1996, the undersigned granted the defendants' motions for summary judgment in this matter, dismissed this action and directed the plaintiffs to show cause why they should not be sanctioned by this court for the filing of a frivolous action. The plaintiffs have now responded to this court's directive and have additionally moved the court to reconsider various motions, i.e., motion for summary judgment, motion for an appointment of a special master, and motion to file motion for summary judgment out of time. After consideration of all the submissions of the parties in this matter, the court finds that the plaintiffs' latest motions are not well taken and the court shall deny them. Additionally, the plaintiffs have filed and continued the litigation of a frivolous matter before this court, and the undersigned shall

sanction them appropriately.

This court has previously dismissed an action filed by the plaintiff Robert Bigsby. Bigsby v. Runyon, Civil Action No. 3:92cv13-D-D (N.D.Miss. Dec. 24, 1995) (Davidson, J.) (Memorandum Opinion and Order Granting Motions for Summary Judgment). This court's dismissal of that action was affirmed by the Fifth Circuit Court of Appeals. Bigsby v. Runyon, No. 95-60106 (5th Cir. Nov. 20, 1995) (Order affirming dismissal). Primarily arising from the same set of operative facts as that first action, the plaintiffs filed the present action on April 14, 1994 in the United States District Court for the Eastern District of Wisconsin. United States District Judge Terrance T. Evans, Chief Judge for the Eastern District of Wisconsin, presided over the case. Upon consideration of the defendants' motion to dismiss or transfer, Chief Judge Evans dismissed all of the plaintiffs' Title VII claims for lack of jurisdiction by order dated September 13, 1994 and transferred the action to this court. Bigsby v. Runyon, Civil Action No. 94-C-407 (E.D.Wis. Sept. 14, 1994) (Evans, C.J.) (Order Dismissing Title VII claims and Transferring Cause to the Northern District of Mississippi). This court, upon consideration of the various motions of the parties, dismissed this action on multiple grounds. Bigsby v. Runyon, 950 F.Supp. 761 (N.D.Miss. 1996). Also on that date, the court stated in its memorandum opinion: This court grows weary of expending judicial energy upon meritless and frivolous lawsuits. Mr. Bigsby has waged a crusade against the Postal Service for several years now, and as already noted, makes his second appearance in this district with his claims. The administrative structures of the Equal Employment Opportunity Commission and the National Labor Relations Board, however, have waded through a seemingly endless stream of filings by Mr. Bigsby. None of his administrative filings have obtained

him official relief, all of his prior claims before this court were dismissed, and all of his claims are being dismissed for multiple reasons in this action today. This court finds that the claims asserted in this cause are frivolous, for the plaintiffs have failed to show that their claims have any basis in fact or law. Had the plaintiffs been required, as pro se prisoner litigants are, to undergo a Spears hearing to determine the merit of their claims prior to the issuance of process, this action would have been dismissed as frivolous long ago. See 28 U.S.C. § 636(b)(1)(B); Uniform Local Rule M-4.1(b); Spears v. McCotter, 766 F.2d 179, 182 (5th Cir.1985). Regrettably, the defendants in this matter did not have the benefit of such a hearing, and as a consequence have undergone an additional two years of litigation.

Pro se litigants are not beyond the purview of the sanctions contained in Federal Rule of Civil Procedure 11 for the filing of meritless and frivolous claims. The Bigsbys are bound by the same obligations as attorneys to investigate their claims, both factually and legally, to determine their merit before filing. Such an obligation ensures that judicial resources are not wasted, and that defendants are not harassed by disgruntled parties with the rigors of unnecessary litigation. As well, this court always carries with it the inherent power to sanction misconduct by the parties appearing before it. Sanctions can be monetary, such as the payment of attorneys' fees for the opposing party, or they may be injunctive. In re Grant Anderson, 511 U.S. 364, 365, 114 S.Ct. 1606, 1607, 128 L.Ed.2d 332 (1994) ; Support Systems Int'l v. Mack, 45 F.3d 185, 186 (7th Cir.1995) ; Vinson v. Heckmann, 940 F.2d 114, 116 (5th Cir.1991) . This court, by order of United States District Judge Neal Biggers, Jr., has recently imposed such injunctive sanctions against a member of the Mississippi bar for his repeated

filing of frivolous actions. Prewitt v. Alexander, Civil Action No.4:94cv94-B-B (N.D.Miss. Feb. 27, 1996) (Biggers, J.) (Opinion and Order Granting Motion for Sanctions; precluding and restraining plaintiff from filing new actions in the Northern District of Mississippi without prior court approval). Therefore, this court directs the plaintiffs to provide reasons to this court why they should not be sanctioned for the filing of this litigation against these defendants. The plaintiffs are forewarned that the lack of training in law is no excuse, for they shoulder the same responsibilities regardless of whether they have hired an attorney. Bigsby v. Runyon, 950 F.Supp. 761, 768 (N.D.Miss.1996). This court went on to direct the plaintiffs to show cause to this court why they should not be sanctioned for the filing of this action.

The plaintiffs have now responded and argue that this court's opinion and order of May 9 was in error. Since that order was in error, they continue, this action is not frivolous. The plaintiffs then discuss a litany of proffered reasons why this court's May 9 order was in error, including various accusations of impropriety by the undersigned. None of the proffered reasons warrant the reconsideration of this court's May 9 order or of motions already ruled upon, and this court shall not reconsider them.

This court has previously warned the plaintiffs of the potential for sanctions, either monetary or injunctive. The plaintiffs' only proffered reason for not imposing sanctions upon them is their contention that this court is incorrect in its determination of the frivolous nature of their claims. As already noted, this court finds no appropriate justification for reconsideration of its May 9 order and will not disturb it, including this court's determination of frivolity.

The defendants have requested that the court impose a quite creative sanction involving required community service, jail time for contempt, and a $10,000.00 fine. After careful consideration, this court is of the opinion that imposing monetary sanctions against the plaintiffs would not adequately serve to ensure that the Bigsbys will not file frivolous actions in the future. The Bigsbys have even foreshadowed the continuation of the frivolous claims presently before the court, even after this court's warnings: By forcing the plaintiff to file this answer, by leaving issues unresolved, by applying the wrong facts, wrong case law, and showing overt hostility toward the Plaintiff[s], this Court has but guaranteed more years of litigation and expense, to the detriment of all parties, and the Courts. Plaintiffs' Answer to Show Cause Order, p. 8. Therefore, instead of the imposition of monetary sanctions or of a creative one like that proposed by the defendants, this court will bar them from filing new actions with this court without an order from an appropriate federal judicial officer certifying that the claims are not frivolous. Further, with the exception of notices of appeal, the plaintiffs shall be likewise barred from filing any new matters in this action. This sanction will help ensure that the court and other parties are not burdened with meritless actions, while at the same time permitting any non-frivolous claims of the plaintiffs to go forward for appropriate consideration.

A separate order in accordance with this opinion shall issue this day.

This the 21st day of November, 1996.

s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

FILED
NOV 22 1996
NORMAN L. GILLESPIE, CLERK

ROBERT L. BIGSBY
and EVELYN BIGSBY
PLAINTIFFS

vs. Civil Action No. 1:94cv278-D-D

MARVIN T. RUNYON,
Postmaster General; UNITED
STATES POSTAL SERVICE; and
NATIONAL RURAL LETTER
CARRIERS ASSOCIATION
DEFENDANTS

ORDER

Pursuant to a memorandum opinion issued this day, it is therefore ORDERED THAT:

1) the motions of the plaintiffs for reconsideration of various motions previously pending before this court is hereby DENIED;

2) the plaintiffs Robert L. Bigsby and Evelyn Bigsby are hereby PRECLUDED from filing any new civil actions before this court without prior appoval from a judicial officer of this cour or of a court with appellate jurisdiction over this court, and are likewise PRECLUDED from making any new filings in this action same a "Notice of Appeal" of any of this court's orders to the Fifth Circuit Court of Appeals. The clerk of the court shall refuse to file any matters presented to him by the plaintiff except those presented in compliance with this order.

All memoranda, depositions, affidavits, and other matters considered by the court in entering this order are hereby incormporated and made a part of the record in this cause.

SO ORDERED, this the 21st day of November 1996.

s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

FILED
JUN 14, 1996
NORMAN L. GILLESPIE, CLERK

ROBERT L. BIGSBY and
EVELYN D. BIGSBY,
Plaintiffs

v. Civil Action No. 1:94CV278-D-D

MARVIN T. RUNYON, PMG;
UNITED STATES POSTAL SERVICE;
AND NATIONAL RURAL LETTER
CARRIERS' ASSOCIATION.
Defendants

ORDER GRANTING EXTENSION OF TIME

This cause is before the court on motion of the pro se plaintiff for an extention of time in which to file a suppplemental brief on his motion to reconsider and alter or amend summary judgment for defendants. The court being of the opinion that the motion is well taken, it is therefore, ORDERED that the pro se plaintiff shall have ten days from the date thereof in which to file his supplemental brief on plaintiff's motion to alter or amend summary judgmnt for defendants.

ORDERED this 14 day of June, 1996.

s/ Glen H. Davidson
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT L. BIGSBY and
EVELYN BIGSBY,
Plaintiffs,

v. Civil Action No. 94-C-407

MARVIN T. RUNYON, Postmaster General;
UNITED STATES POSTAL SERVICE; and
NATIONAL RURAL LETTER CARRIERS'
ASSOCIATION,
Defendants.

ORDER

This is an action filed pro se by Robert L. and Evelyn Bigsby against Mr. Bigsby's employer and a union (of which he says he is not a member). Currently under consideration are the motions of Marvin R. Runyon, Postmaster General, the United States Postal Service, and the National Rural Letter Carriers' Association to dismiss this action or alternatively for a transfer of venue.

Robert L. Bigsby was a rural letter carrier in Mississippi. He currently is an electronic technician in the United States Post Office in Oshkosh, Wisconsin. Evelyn Bigsby is his wife; she continues to reside in Booneville, Mississippi.

Mr. Bigsby finds himself in Oshkosh Wisconsin, as a result of the settlement of disputes arising in Mississippi between him and the Postal Service. In 1990 Mr. Bigsby had offered a settlement proposal as follows:

> place me in a Level 9, Step O
> Electronic Technician position,

> giving me the option of choosing which duty station outside of my present MSC I wish to work, based upon the availability of legitimate openings.

The union, the National Rural Letter Carriers' Association (NRLCA), which represented Mr. Bigsby, was under the impression that in 1993, Mr. Bigsby wanted to relocate in Madison, Wisconsin. Apparently, through much effort on the part of the union and the Postal Service, a position as an electronic technician was secured for Mr. Bigsby. Nevertheless, he remains unhappy.

It appears that over the years Mr. Bigsby has often been unhappy about decisions affecting his employment. Also, it appears that when he is unhappy, he files complaints. Since he became employed in 1980 as a rural carrier through 1992, he has filed charges with the National Labor Relations Board. A list of his claims is attached to this decision. In addition, he has a case pending in the United States District Court for the Northern District of Mississippi in which he alleges employment discrimination on the basis of sex, age, religion, and handicap, as well as retaliation.

In the present case he alleges breach of contract, intentional discrimination and reprisal, intentional infliction of emotional distress, and financial hardship. The claims arise out of the 1993 settlement agreement in which he obtained a lump sum payment of !16,718.31 as well as the position in Oshkosh.

Not surprisingly, the defendants seem to feel somewhat aggrieved by Mr. Bigsby filing a lawsuit after he obtained what might be considered a settlement that was beneficial to him. They seek dismissal of the case because venue is improper, or in the alternative they

seek a change of venue to the Northern District of Mississippi.

The Title VII claims must be dismissed, defendants contend, because under 42 U.S.C. 2000e-16(c), venue is proper only in the

> judicial district in the state in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice . . .

They argue that the employment decision was made in Mississippi and the alleged unlawful practice occurred there. Furthermore, the relevant records are not in this district. Mr. Bigsby says that his title VII claim is not ripe because he does not have a notice of right to sue. The rest of the claims, he contends, are properly brought in this district.

On the basis of Mr. Bigsby's representation regarding the title VII claim, that claim is dismissed. The remaining claims grow out of a dispute which arose during Mr. Bigsby's employment in Mississippi. He worked at the post office in Ripley, Mississippi. The settlement was negotiated in Mississippi. As part of that settlement, Mr. Bigsby obtained a position as an electronic technician in Oshkosh, Wisconsin. That the job was in Wisconsin is the only possible reason this lawsuit was filed here. The lawsuit, however, is not where he wants to be.

All these factors indicate that Mississippi is the proper venue for this suit.

In addition, Mr. Bigsby has another case pending in Mississippi. The complaint in the case pending here refers at length to the Mississippi case. In paragraphs 7 and 8, he describes the lawsuit as it involves a claim regarding the post office subsidizing the mailing of the Sears, Roebuck catalog. In paragraph 9, he describes his claim in the Mississippi suit regarding the requirement that rural mail carriers sell single stamps to customers and then affix those stamps to their letters. That, he says, poses a health risk to carriers; he states that he has contacted the Center for Disease Control regarding the requirement. In paragraph 10, he discusses his claim regarding carriers being paid by the route, rather than by the time worked. Paying by the route, he contends, can encourage carriers to rush through their routes, at the "expense of accuracy and safety" and could contribute to a situation such as Domino's Pizza faced in a lawsuit against them. Paragraphs 11 through 26 refer as well to the events which happened in Mississippi prior to the settlement of which he complains here.

The union states that the Mississippi suit has consumed several weeks of judicial time and attention. The court in Mississippi is well acquainted with Mr. Bigsby's claims. The union also points out that to require it to litigate what appear to the same claims in two forums poses a hardship. In addition, there is a risk of conflicting results.

For these reasons, pursuant to 28 U.S.C. § 1404(a), the remaining claims in this case (other than the dismissed title VII claims) are transferred to the United States District Court fir the Northern District of Mississippi.

IT IS THEREFORE ORDERED that the claims brought under 42 U.S.C. § 2000e are DISMISSED.

IT IS FURTHER ORDERED that this case is TRANSFERRED to the United States District Court for the Northern District of Mississippi.

Dated at Milwaukee, Wisconsin, this 13 September, 1994

BY THE COURT:

s/TERRENCE T. EVANS
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ROBERT L. BIGSBY — PLAINTIFF

vs. Civil Action No. 3:92cv013-D-D

MARVIN T. RUNYON, Postmaster General; UNITED STATES POSTAL SERVICE; and NATIONAL RURAL LETTER CARRIERS ASSOCIATION — DEFENDANTS

MEMORANDUM OPINION

This matter is before the undersigned upon the motions of the defendants for summary judgment in this matter. Finding the motions well taken, they will be granted.

The pro se plaintiff Robert Bigsby originally filed the first of his four complaints in this cause in January of 1992. Acknowledging the proclivity of Mr. Bigsby to file these and other numerous and cumulative documents with the court clerk, this court issued an order dated December 23, 1992 which in part directed the plaintiff to file a final amended complaint which would supersede all other complaints. With the assistance of court-appointed counsel, this final complaint was filed by the plaintiff.[1] It is this fourth

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[1] This court has appointed counsel for the plaintiff on two occasions in hopes that this cause could be handled in a more proper and expidited manner. However, both attorneys that were appointed by this court requested that they be permitted to withdraw. This court permitted both to withdraw, and the

and final amended complaint from which the court will draw the plaintiff's claims for purposes of the summary judgment motions at bar. Any other claims that the plaintiff might have argued or raised in other documents submitted to this court will not be considered in that they are not properly before this court.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327, 106 S.Ct. at 2554. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for

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plaintiff is again proceeding pro se. This court attributes the excessive number of docket entries in this matter (over 150 at the time this opinion was drafted) to Mr. Bigsby's proficiency with a word processor, as well as his naming of defendants which were later properly dismissed from this suit.

trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. and Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the non-moving party. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992).

FACTUAL BACKGROUND

While the factual background of this case and Mr. Bigsby's multiplicity of claims is too extensive to be discussed here, most of the relevant facts are not in dispute among the parties. Where facts are required for an analysis of the issues addressed in this opinion, they will be provided by the court.

DISCUSSION

I. LAW APPLICABLE TO THE PLAINTIFF'S CLAIMS

This court is in agreement with the defendants as to the applicable statutory provisions under Federal law which govern the plaintiff's claims in this cause. The plaintiff has apparently asserted several types of claims, but has failed to direct this court to all of the applicable statutory provisions. It is apparent to this court that the applicable provisions are:

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), under these facts governs exclusively for all of the claims involving discrimination claims based upon religion, sex and reprisal;

2. The Rehabilitation Act of 1973, 29 U.S.C § 791, et. seq., governs exclusively for all of the claims involving discrimination based upon handicap;

3. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a, governs exclusively for all of the claims involving discrimination based upon age; and

4. 39 U.S.C. § 1208(b) of the Postal Reorganization Act governs for all claims involving an alleged breach of any collective bargaining agreement as well as any claims of a breach of a duty of fair representation

since the plaintiff's employer in this case is the United States Postal Service.

II. PRELIMINARY REQUIREMENTS OF THE PLAINTIFF'S DISCRIMINATION CLAIMS

The plaintiff has asserted various claims of employment discrimination, apparently including discrimination based on religion, sex, and reprisal for prior activity. All of these claims are properly addressed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c).

There are two preliminary requirements before a party is permitted to pursue a Title VII action in federal court: 1) the complaint must be filed within the time allotted by Title VII, and 2) the complainant must first have exhausted any administrative remedies. Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990). "Failure to comply with either of these requirements wholly deprives the district court of jurisdiction over the case; it is well settled law of this circuit that each requirement is a prerequisite to federal subject matter jurisdiction." Tolbert, 916 F.2d at 247 (citing Brown v. Department of the Army, 854 F.2d 77, 78 (5th Cir. 1988), and Porter v. Adams, 639 F.2d 273, 276 (5th Cir. 1981)). If the plaintiff in this case has not met these two requirements as to each of his Title VII claims, this court has no jurisdiction to hear those claims.

A. UNTIMELY FILING OF CLAIMS IN FEDERAL DISTRICT COURT

A federal employee who files an action under Title VII, such as the plaintiff, must file his complaint within ninety (90) days of receipt of a right-to-sue letter. Brown, 854 F.2d at 78; 42 U.S.C. § 2000e-16(c). The defendants have correctly noted that this requirement also applies to claims asserted under the Age Discrimination in Employment Act and for the claims based upon handicap. See. e.g., Honeycutt v. Long, 861 F.2d 1346, 1349 (5th Cir. 1988); 29 U.S.C. § 626(e). Because this timely filing is jurisdictional, it is

not subject to waiver, estoppel, or equitable tolling. Munoz v. Aldridge, 894 F.2d 1489, 1494 (5th Cir. 1990). Turning to the claims in the case at hand, it is apparent to this court that the plaintiff has failed to assert some of his claims within the required time period. Notably, these claims are:

1) claims arising from the administrative case no. 3-C-1063-91. The right-to-sue letter was received by the plaintiff for these claims on June 24, 1992. Plaintiff did not attempt to assert these claims in this court until May 6, 1993, in ¶ 17 of the plaintiff's Fourth Amended Complaint.

2) claims arising from the administrative case no. 3-C-1263-92. The final administrative decision in this matter was rendered on October 23, 1992. Plaintiff did not attempt to assert these claims in this court until May 6, 1993, in ¶ 19 of the plaintiff's Fourth Amended Complaint.

3) claims arising from administrative case no. 3-C-1128-92. The plaintiff received his right-to-sue letter for these claims on September 19, 1992. The plaintiff did not properly present these claims before this court until May 6, 1993, in ¶ 18 of the plaintiff's Fourth Amended Complaint.

Successful assertion of all of these claims was contingent upon timely filing within the ninety day jurisdictional requirement. In that the time restrictions were not complied with, this court has no jurisdiction to hear those claims. There is no genuine issue of material fact as to these claims and the defendants are entitled to a judgment as a matter of law.

B. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

As mentioned, the second jurisdictional requirement is that the plaintiff exhaust all administrative remedies before filing an action in federal district court. This exhaustion encompasses "compliance with the

administrative review apparatus" of Title VII, and includes the timely filing of an administrative complaint. See Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980). This requirement is also applicable under the Rehabilitation Act, and under these facts it is applicable under the ADEA as well. Prewitt v. U.S.P.S., 662 F.2d 292, 303-304 (5th Cir. 1981); Patterson v. Weinberger, 644 F.2d 521, 523-524 (5th Cir. 1981).

Federal regulations at the time required the plaintiff to consult with an EEO counselor within thirty (30) calendar days "of the date of the alleged discriminatory event." 29 C.F.R. § 1613.214(a)(i). The plaintiff did not comply with this requirement on at least four of his claims:

1) claims arising from administrative case no. 3-C-1062-91, contained in the plaintiff's Fourth Amended Complaint, ¶¶ 6-7. The alleged constructive discharge occurred in September of 1988, but the plaintiff did not request counselling until March 7, 1991.

2) claims arising from administrative case no. 3-C-1046-92, contained in the plaintiff's Fourth Amended Complaint, ¶¶ 8-9. The relocation complained of occurred in December of 1990, but the plaintiff did not request EEO counselling until October 24, 1991.

3) claims arising from administrative case no. 3-C-1089-91, contained in plaintiff's Fourth Amended Complaint, ¶¶ 10-11. Plaintiff was first required to affix stamps for his rural route customers when he became a rural carrier, but did not file his EEO complaint until July 1, 1991.

4) claims arising from administrative case no. 3-C-1091-91, contained in plaintiff's Fourth Amended Complaint, ¶¶ 14-15. The plaintiff alleged interference with his Worker's Compensation Claim in September of 1990, but did not seek EEO counselling until July 1, 1991.

It is obvious to this court that as to

these four sets of claims, the plaintiff did not properly comply with the statutory time requirements. However, unlike the time limits for filing a complaint in district court, the time limits of Title VII for filing an **administrative** complaint are subject to equitable tolling. Munoz, 894 F.2d at 1494; Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981). This court is of the opinion that the plaintiff is not entitled to have any of these limitations periods equitably tolled in his favor. The plaintiff failed to consult an EEO counsellor until months, and sometimes years, later than that required by the Code of Federal Regulations. There are no legitimate explanations by the plaintiff as to why the regulations were not complied with, and there appears to be no justification for treating these incidents as "continuing violations" as the plaintiff suggests, and thereby allowing the plaintiff to circumvent the regulatory requirements. There is no genuine issue as to any material fact with regard to these claims, and the defendants are entitled to a judgment as a matter of law.

III. THE PLAINTIFF'S CLAIMS WHICH ARE MOOT

Prior to the Civil Rights Act of 1991, punitive and compensatory damages were not available as relief under in a Title VII action. See, e.g., Bennett v. Carron & Black Corp., 845 F.2d 104, (5th Cir. 1988). The Civil Rights Act of 1991, however, provides for the award of compensatory damages under certain circumstances in Title VII or Rehabilitation Act cases. 42 U.S.C. § 1977 a(a)(b). Further, this relief is not available for any conduct which occurred before November 21, 1991, the effective date of the Act. Landgraf v. USI File Products, 968 F.2d 427, 432 (5th Cir. 1992). Therefore, any claims that the plaintiff might have which arise out of conduct occurring before November 21, 1991 would entitle him to only equitable relief.

The plaintiff has been reassigned from

his rural letter carrier position in Ripley, Mississippi to the post office in Oshkosh, Wisconsin, where he serves as an electronics technician. This reassignment makes the granting of equitable relief by this court on several of his claims unnecessary. This in conjunction with the fact that even if successful he would be unable to recover monetary damages on several of his claims, makes those claims moot because there is no relief that this court could award. There is no information before this court to indicate, and the plaintiff has not even asserted, that the alleged violations of the defendants originated anywhere other than the particular post offices in which he worked in Mississippi. In that he is no longer employed in those offices, it cannot be said that there is a reasonable expectation that these alleged violations will reoccur. See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Valdez v. Church's Fried Chicken, 683 F.Supp. 596, 621 (W.D. Tex. 1988). Any of the plaintiff's claims which arose from conduct which occurred before November 21, 1991, and for which equitable relief would now be unnecessary, have become moot and are properly dismissed. These claims encompass several which are being dismissed by this court on other grounds, but also include:

1) claims arising out of administrative case no. 3-C-1092-90, contained in the plaintiff's Fourth Amended Complaint, ¶ 17. The plaintiff asserts that the defendants attempted to controvert a worker's compensation claim and attempted to have the plaintiff arrested for tampering with mailboxes. The administrative complaint was filed on August 10, 1990.

2) claims arising out of administrative case no. 3-C-1045-91, contained the plaintiff's Fourth Amended Complaint, ¶ 17. The plaintiff asserts that he was improperly required to provide medical documentation for one day of sick leave. The administrative

complaint was filed on March 7, 1991.

3) claims arising out of administrative case no. 3-C-1076-91, contained in the plaintiff's Fourth Amended Complaint, ¶ 17. The plaintiff asserts that he was not selected for the position of ad hoc rural carrier instructor based upon his religion and prior EEO activity.

4) claims arising out of administrative case no. 3-C-1077-91, contained in the plaintiff's Fourth Amended Complaint, ¶ 17. The plaintiff asserts that he was improperly required to undergo a fitness for duty examination after he made statements relative to homicide and suicide.

IV. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT AND BREACH OF THE DUTY OF FAIR REPRESENTATION

The plaintiff has also asserted a claim against both defendants for breach of contract, and asserted a claim against defendant National Rural Letter Carriers Association for breach of the duty of fair representation. These claims are contained in paragraphs twenty (20) through twenty-three (23) of the plaintiff's Fourth Amended Complaint. The date designated by the plaintiff for these breaches is November of 1990. Any state law contract claims are preempted by federal law in this situation, and the statute of limitations applicable to these claims is a period of six months. Del Costello v. Teamsters, 462 U.S. 151, 169-72, 103 S.Ct. 2281, 2293-95, 76 L.Ed.2d 476 (1983); Nelson v. Local 854 Dock Workers, 993 F.2d 496, 498 (5th Cir. 1993); Wood v. Houston Belt & Terminal Ry., 958 F.2d 95, 97 (5th Cir. 1992). Mr. Bigsby did not file his original complaint in this cause until January 28, 1992. These claims are barred by the statute of limitations, and are therefore properly resolved on a motion for summary judgement. There is no genuine issue of material fact with regard to these claims, and the defendants are entitled to a judgment as a

matter of law with regard to them.

V. THE PLAINTIFF'S CLAIMS OF DISCRIMINATION

Although many of the plaintiff's claims need not be addressed by this court on their merits, there remain several claims of discrimination which must be discussed. These claims are:

1) claims arising from administrative case no. 3-C-1100-92, contained in plaintiff's Fourth Amended Complaint, ¶ 17.

2) claims arising from administrative case no. 3-C-1091-90, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

3) claims arising from administrative case no. 3-C-1101-90, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

4) claims arising from administrative case no. 3-C-1090-91, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

5) claims arising from administrative case no. 3-C-1032-92, as contained in plaintiff's Fourth Amended Complaint, ¶ 17.

The plaintiff must properly assert those claims and provide sufficient evidence to this court to avert a grant of a judgment as a matter of law in favor of the defendants. It is not necessary for this court to analyze each element of each type of discrimination claim that Mr. Bigsby has asserted in this action. In order to establish a prima facie case of discrimination under any of his potential claims, he must show that there was intentional discrimination by the defendants by virtue of his status (be it age, sex, religion or otherwise).

"When faced with a properly supported motion for summary judgment, a non-movant, such as plaintiff, cannot merely 'sit back and wait for trial.'" Hinton v. Teamsters Local Union No. 891, 818 F.Supp. 939 (N.D. Miss. 1993) (quoting Page v. De Laune, 837 F.2d 233, 238 (5th Cir. 1988)). As in Hinton, Mr. Bigsby must "come forward with affirmative evidence creating a factual issue on his claim

that he was treated differently" because of his handicap, age, or religious belief. Hinton, 818 F.Supp. at 944. Mr. Bigsby has responded to the defendant's motions for summary judgment, but has done nothing but make conclusory allegations concerning the motivation of the defendants in the employment decisions affecting him. This is insufficient to survive a properly-made motion for summary judgment on these issues. Again, as this court has noted in Hinton:

> [the] plaintiff's attempts to create a genuine issue of material fact suggest only an "'attenuated possibility that a jury would infer a discriminatory motive,'" Thornburough v. Columbus & Greenville Railroad Co., 760 F.2d 633, 645 n. 19 (5th Cir. 1985) (citation omitted), . . . Furthermore, a party against whom summary judgment is sought cannot raise a fact issue simply by "asserting a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." Clark v. Resistoflex Co., A Division of Unidynamics Corp., 854 F.2d 762, 771 (5th Cir. 1988) (citation omitted). In this case, the "'possibility of a jury drawing a contrary inference sufficient to create a dispute as to a material fact does not reify to the point even of a thin vapor capable of being seen or realized by a reasonable jury.'" Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 814 (5th Cir. 1991) (citation omitted).

Hinton, 818 F.Supp at 944. Mr. Bigsby has not even offered evidence or asserted that other employees were treated differently under the same or similar circumstances. Further, there is no circumstantial evidence before this court that would indicate a discriminatory intent on behalf of the defendants. Based on

the pleadings and matters presented, this court can find no genuine issue of material fact as to the plaintiff's remaining claims of discrimination or as to any other of the plaintiff's claims, and is of the opinion that the defendants are entitled to a judgment as a matter of law.

A separate order shall issue this day.

This, the 5th day of December, 1994.

S/ GLENN H. DAVIDSON

UnitedStates District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ROBERT L. BIGSBY — PLAINTIFF

vs. Civil Action No. 3:92cv013-D-D

MARVIN T. RUNYON, Postmaster General; UNITED STATES POSTAL SERVICE; and NATIONAL RURAL LETTER CARRIERS ASSOCIATION — DEFENDANTS

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

This matter is before the undersigned on the separate motions of the defendants in this cause. Upon thorough review of all of the numerous pleadings and submissions in this case, this court concludes that the defendants' motions are well taken and should be granted. This court finds that there are no genuine issues of material fact and that the defendants in this case are entitled to judgment as a matter of law. Therefore, it is hereby ORDERED THAT:

1) the motion of the defendants Postmaster General and the United States Postal Service for summary judgment is hereby GRANTED.

2) the motion of the defendant National Rural Letter Carriers Association for summary judgment is hereby GRANTED.

3) the motions of the plaintiff Robert Bigsby for summary judgment are hereby DENIED.

All memoranda, depositions, affidavits and other matters considered by this court in granting the defendants' motions for summary judgment and denying the plaintiff's motions for summary judgment are hereby incorporated and made a part of the record in this cause.

This, the 5th day of December, 1994.

s/GLEN H. DAVIDSON
United States District Judge

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(seal) Birmingham District

Jackson Area Office
207 Wet Amite Street
Jackson, MS 39201
PH. (601) 965-4537
TDD (601) 965-4915
FAX (601) 965-5272

Certified No. P 085 719 350
Charge No. 131-93-0992
Robert Bigsby
Post Office Box 2265
Oshkosh, WI 54903 Charging Party

National Rural Letter Carriers Association
Post Office Box 2172
Tupelo, MS 38803 Respondent

DETERMINATION

On behalf of the Commission, I issue the following determination on the merits of the subject charge. All requirements for coverage are met. Charging Party alleged that (s)he was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, Atheist and in retaliation for having filed previous EEOC charges.

Examination of the evidence indicates: Charging Party was represented by legal counsel for Respondent after Charging Party filed a grievance when he was discharged February 9, 1992. Records show on December 9, 1992, the settlement agreement was to reinstate the Charging Party, no loss of seniority and backpay. Records show Charging Party's discharge was reduced to a seven day suspension. Records show Charging Party returned to work, however dissatisfied with the seven day suspension in lieu of the discharge.

Charging Party contends that by the Legal Counsel settlement for less than a clear record this is retaliation for filing previous EEOC charges. However, records show that the union continues to represent the Charging Party when he files a grievance. Additionally this investigative file failed to uncover a causal connection in the union's legal counsel to settle for the referenced benefits and a seven day suspension to be retaliatory under

the statute.

Additionally, Charging Party contends that he has been denied religious accommodation; however, documentation submitted by Charging Party shows this allegation is untimely because his employer would not accommodate him in March 1990.

Based in this analysis, I have determined that the evidence obtained during the investigation was insufficient to establish violations of the statute(s).

This determination and dismissal concludes the processing of this charge. This letter will be the only notice for dismissal and the only notice of the Charging Party's right to sue sent by the Commission. Following this dismissal, the charging party may only pursue this matter by filing suit against the respondent(s) named in the charge within 90 days of receipt of this letter. Otherwise, the Charging Party's right to sue will be lost.

You are reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission investigations is also prohibited, These protections apply regardless of the Commission's determination on the merits of the charge.

On Behalf of the Commission
Date: 9/30/94 s/_____
Henrene Matthews, Area Director

Enclosures: Information Sheet on Filing Suit under Title VII in Federal District Court

cc. Charging Party Attorney
Respondent Attorney

UNITED STATES POSTAL SERVICE
GREAT LAKES/MIDWEST AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY CASE

IN THE MATTER OF:

Robert L. Bigsby,)
Complainant,)
v.) Case No. 1-1-536-1009-94
) Filed On February 4, 1994
Marvin T. Runyon,)
Postmaster General,)Certified # P851 205 438
United States)
Postal Service,)
Respondent.)
)

FINAL AGENCY DECISION

This is the final agency decision of the U.S. Postal Service in the above referenced matter. In this complaint you alleged discrimination on the basis of religion (Atheist), physical disability (diabetes), mental disability (anxiety/depression), and age (43 years old) when on November 8, 1993, you were:

1) involuntarily promoted to an Electronic Technician (ET-9) position;
2) denied a transfer back to Tupelo, Mississippi and:
3) denied court leave.

Equal Employment Opportunity Commission complaint processing regulations, in effect when the request for counseling was made under Title 29 CFR §1614.107 states:

The agency shall dismiss a complaint or a portion of a complaint,

> (a) that fails to state a claim under §1614.106(a) or states the same claim that is pending before

or has been decided by the agency or Commission.

On May 19, 1994, the agency accepted for investigation in Case No. 4-H-390-1032-94, the same issue(s) surrounding this case. Therefor the complaint is dismissed for filing a complaint that is already before the agency.

RIGHT TO FILE A CIVIL ACTION

If you are dissatisfied with the Postal Service's final agency decision in this case, you may file a civil action in an appropriate U.S. District Court within 90 calendar days of your receipt of the Postal Service's final agency decision. If you chose to file a civil action, that action should be captioned Robert L. Bigsby v. Marvin T. Runyon, Postmaster General. You may also request the court to appoint an attorney for you and to authorize the commencement of that action without the payment of fees, costs, or security in such circumstance as the court deems just. Your application must be filed within the same 90 day time period for filing the civil action.

APPEAL TO THE EEOC

Alternatively, you may file an appeal with the Office of Federal Operations, Equal Employment Opportunity Commission (EEOC), P.O. Box 19848, Washington, D.C. 20036-0848, within 30 calendar days of the date of your receipt of this decision. Any supporting statement or brief must be submitted to the EEOC within 30 calendar days of filing the appeal. Along with your appeal, you must submit proof to the EEOC that a copy of the appeal and any supporting documentation were also submitted to the EEO Compliance/Appeals Coordinator, Great Lakes/Midwest Area Office, U.S. Postal Service, 433 W. Van Buren Street, Room 1122, Chicago, Illinois 60699-0978, Failure to file within 30 day period could result in the EEOC's dismissal of the appeal unless you

explain, in writing the extenuating circumstances which prevented you from filing within the prescribed time limit. In this event, extension of the time limit and acceptance of the appeal will be discretionary with the EEOC.

8/8/94
__ Date

s/
Michael L.Garrett
EEO Compliance/Appeals Coordinator

Enclosures
Robert L. Bigsby
P.O. Box 2265
Oshkosh, Wi 54903-2265

cc. See reference list on page 3.